

**Sommerville Construction Co. and International Union of Bricklayers & Allied Craftsmen Local No. 4 of Indiana and Kentucky, Merrillville Chapter, affiliated with International Union of Bricklayers & Allied Craftsmen, AFL-CIO. Case 25-CA-25276**

January 29, 1999

**DECISION AND ORDER**

BY MEMBERS FOX, LIEBMAN, AND BRAME

On November 20, 1998, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions,<sup>1</sup> to modify the remedy,<sup>2</sup> and to adopt the recommended Order as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Somerville Construction Co., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Make whole, with interest, the unit employees by paying the pension and other benefit funds contributions mandated by the relevant collective-bargaining agreements that the Respondent failed to make, and by remit-

<sup>1</sup> The Respondent has not filed any exceptions to the judge's decision.

<sup>2</sup> The General Counsel, in his limited exceptions, has requested that the Board modify the judge's remedy to order that the Respondent remit to the Union dues and other payments that the Respondent should have deducted from the wages of employees who signed valid dues-checkoff authorizations, and that the Respondent mail the Notice to Employees to all employees that it employed at any time since October 31, 1995.

Regarding the dues-checkoff payments, it is well established that the Board requires an employer to reimburse the union for such payments that it failed to make under the collective-bargaining agreement, where employees have signed valid authorizations for the employer to deduct union dues from their wages. *W. J. Holloway & Son*, 307 NLRB 487, fn. 3 (1992). Accordingly, we shall modify the remedy to require that the Respondent make these payments.

Regarding the mailing of the notices, we agree with the General Counsel that there has been a significant amount of employee turnover in the Respondent's work force since the Respondent repudiated its collective-bargaining agreement with the Union. Although the General Counsel requests that the Board direct the Respondent to mail the notice to all employees that the Respondent employed at any time since executing its collective-bargaining agreement with the Union on October 31, 1995, the evidence shows that the Respondent did not repudiate that agreement until about 3 or 4 months later. In these circumstances, we shall order the Respondent to mail the notice to all employees that it employed at any time since February 1, 1996, the approximate date that the repudiation occurred.

ting to the Union dues and other payments that employees, through signed dues checkoffs, had authorized the Respondent to deduct from their wages, together with interest, as provided for in this decision."

2. Insert the following as paragraph 2(f) and reletter the subsequent paragraph accordingly.

"(f) Mail a copy of the attached notice to all employees that the Respondent employed at any time since February 1, 1996, which was the approximate date that the Respondent repudiated its collective-bargaining agreement with the Union. The notice shall be mailed to the last known address of each employee. Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be mailed immediately on receipt by the Respondent, as directed above."

3. Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT untimely repudiate the terms and conditions of our collective-bargaining agreement with International Union of Bricklayers & Allied Craftsmen Local No. 4 of Indiana and Kentucky, Merrillville Chapter, affiliated with International Union of Bricklayers & Allied Craftsmen, AFL-CIO, and WE WILL NOT fail and refuse to recognize and abide by the terms of that agreement.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective-bargaining agreement, including but not limited to making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining and making dues-checkoff payments on behalf of employees who have authorized us to deduct them from their wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, all employees in the bargaining unit for any losses they may have suffered as a result of our unlawful failure and refusal to adhere to the terms of the collective-bargaining agreement.

WE WILL make whole, with interest, the unit employees by paying the pension and other benefit funds contributions mandated by the relevant collective-bargaining agreements that the Respondent failed to make, and by remitting to the Union dues and other payments that em-

employees, through signed dues checkoffs, had authorized the Respondent to deduct from their wages, together with interest.

## SOMMERVILLE CONSTRUCTION COMPANY

*Joseph P. Sbuttoni, Esq.*, for the General Counsel.

*Robert S. Rifkin, Esq.*, of Indianapolis, Indiana,  
for the Respondent.

*Paul T. Berkowitz, Esq.*, of Chicago, Illinois, for the Charging  
Party.

### DECISION

#### STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on September 10, 1998, at Indianapolis, Indiana, on the General Counsel's complaint which alleged that the Respondent repudiated its collective-bargaining agreement with the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the contract which it entered into with the Charging Party was meant to be applicable only to two specific projects.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is a proprietorship owned and operated by Homer Sommerville and engaged in the construction industry as a masonry contractor throughout the State of Indiana and adjoining States. The Respondent annually performs services in excess of \$50,000 in States other than Indiana. The Respondent admits and I conclude that he is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

International Union of Bricklayers & Allied Craftsmen Local No. 4 of Indiana and Kentucky, Merrillville Chapter, a/w International Union of Bricklayers & Allied Craftsmen, AFL-CIO is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. The Facts

Indiana Bricklayers Local No. 4, Indiana/Kentucky (as the Union is styled in its collective-bargaining agreement with the Indiana Mason Contractors Statewide Association, Inc.) has geographical jurisdiction in Indiana and 24 counties in Kentucky. Some years ago several Bricklayers locals combined to form Local No. 4. The Union now has 10 chapters, each of which has a defined geographical jurisdiction. The one involved in this matter is the Merrillville Chapter headed by Field Representative Dale Johnsen, with offices at Anderson, Indiana.

The Union has had successive collective-bargaining agreements with the Indiana Mason Contractors Statewide Association, Inc. (the Association). The one here involved was signed

on August 17, 1995,<sup>1</sup> to be effective until May 31, 1998. These parties have negotiated and executed a successor agreement.

The Respondent has been in business 30 plus years during which period he has operated as a nonunion employer, although Sommerville testified that on some jobs he was required to pay union wages and did so.

Sometime in mid-1995, Sommerville was solicited by representatives of Trademark Construction Company to bid on two projects—one at Portage, Indiana, and the other at Michigan City, Indiana. Sommerville received the bids and began working on the Portage project in the late summer. After Sommerville was on the project about 30 to 45 days, Johnsen and another field representative of the Union visited the jobsite and ultimately concluded that masonry work was being done by nonmembers of the Union. They (along with a representative of the laborers union) requested a meeting with officials of Trademark and Sommerville.

This meeting took place on October 31. In essence, the Union's representatives wanted Sommerville to sign the agreement they had with the Association. Sommerville protested that the wage rate was too high, however Steven Warne, the project manager for Trademark, offered to make up the difference, though he testified he was "put out" by the prospect. Johnsen told Warne that the Union could offer Market Recovery Program for the specific projects. Though not detailed in the record, it appears that this program would allow the Respondent to have more apprentices than contractually allowed. These are individuals who have experience in the industry and are styled "Improvers." In effect, "Improvers" are at the level of journeymen, but do not receive the journeyman rate nor are all the fringe benefit payments made for them.

Sommerville maintains that he did not sign the contract at this time. His testimony was supported by Warne and Steve Flick, the construction superintendent. However, Sommerville did agree that he signed the Memorandum of Agreement,<sup>2</sup> as well as the Assent of Participation (in the fringe benefits funds and apprenticeship training program) which Johnsen also signed. The memorandum is a form on which there is added by typewriter, "Sommerville Construction Company," "October 31, 1995," "31st," "October," "5," and "Merrillville Chapter." The assent is also a form, on which was typed "31st" and "October 1995."

Sommerville, Warne, and Flick all testified that the union representatives had no documents with them on October 31 and that Sommerville did not sign the contract then. Johnsen and his assistant, Jerry Brown, testified that they came to the meeting with their standard packet of materials—two copies each of the memorandum and the assent, a surety bond and a copy of the bound contract between the Union and the Association. They testified that Sommerville signed both sets of documents and that on November 1 Johnsen sent Sommerville one copy each of the memorandum and assent along Market Recovery Program agreements for Portage and Michigan City.

<sup>1</sup> All dates hereafter are in 1995, unless otherwise indicated.

<sup>2</sup> Counsel for the Respondent apparently argues that the memorandum was not a complete document since appearing at the bottom of the page is "21" indicating 20 preceding pages. Johnsen credibly explained that the association contract was originally in long-page form, of which the memorandum was the 21st page. The association contract now, and in evidence, is in booklet form.

He wrote: "Here is what we agreed upon, please sign both sets of paper. We need this back as soon as possible to finalize the agreement. If you have any questions, please contact the Merrillville Chapter Union Hall." According to Johnsen, he enclosed the Market Recovery Program agreements for Portage and Michigan City, each of which was two pages. According to Sommerville, enclosed was only the first page of each Market Recovery Program agreement as well as the Assent of Participation and the Memorandum of Agreement. Johnsen testified that Sommerville did not respond to his letter. Sommerville testified that sometime later he signed the memorandum and assent and sent them back to Johnsen.

Since the Assent of Participation and the Memorandum of Agreement as well as the two Market Recovery Program agreements include typed portions (in the same font as that used in Johnsen's letter), it appears more likely than not that all these documents were prepared in Johnsen's office and sent to Sommerville. Since Sommerville in fact signed the assent and memorandum, and is uncredibly vague about whether he in fact returned anything to Johnsen, I credit Johnsen that Sommerville signed the agreements on October 31. I conclude that the packet sent to Sommerville included not only the two Market Recovery Program agreements for him to sign, but also included copies of the memorandum and assent which he had already signed.

That the union representatives would have, and present to Sommerville, the packet of materials is reasonable and consistent with their aim of signing Sommerville as a participating contractor. The version of Johnsen and Brown is simply more credible and plausible than that of Sommerville, Warne, and Flick. Further, I credit Brown's testimony that it was not their practice to include a Market Recovery Program agreement in their standard packet. Indeed, they had never before offered one.

However, exactly when Sommerville signed the agreements makes little difference. Counsel for the Respondent has not suggested why it would matter whether Sommerville signed the memorandum and assent on October 31 or sometime later. Sommerville, in fact, signed them and on the following Monday replaced his current employees and began contributing to the fringe benefit funds pursuant to the contract and the Market Recovery Program. Four of the five journeymen on the payroll signed applications for membership and dues-checkoff authorizations.

Since leaving the Portage project, Sommerville has not complied with the terms of the Union's contract with the Association, or the successor which became effective May 31, 1998.<sup>3</sup>

#### *B. Analysis and Concluding Findings*

On these facts the General Counsel argues that the Respondent repudiated a collective-bargaining agreement in violation of Section 8(a)(5) of the Act. The Respondent argues that the

agreement he signed was "site specific" limited to the two projects of Portage and Michigan City.

While the Market Recovery Program agreements give some plausibility to Sommerville's argument, the fact remains that he signed the memorandum and that document is clear and unambiguous:

1. The EMPLOYER recognizes the UNION as the sole and exclusive collective bargaining representative for and on behalf of the employees of the EMPLOYER now or hereinafter employed within the territorial or occupational jurisdictions of the UNION.

2. The parties do hereby adopt the latest Agreement, and all approved amendments thereto, between the Union and the Indiana Statewide Association, and agree to be bound by all of the terms and conditions thereof for the duration of such Agreement and for the period of any subsequent extensions including any amendments which may be subsequently made and any subsequent Agreements.

3. The parties agree to be bound by the terms and conditions of any Trust Fund Agreements identified in the aforesaid Agreement and amendments thereof, accepting and ratifying the appointment of the employer Trustees and their successors for the aforesaid period.

Article II of the agreement between the Association and Local No. 4 states that it "shall be in effect within the boundaries of the State of Indiana" and certain counties of Kentucky and:

A. This AGREEMENT covers all construction work within the jurisdiction of the International Union, as defined in the Constitution of the International Union, as well as all other work normally and traditionally assigned to and performed by employees represented by the International Union of Bricklayers and Allied Craftsmen. He bound himself to the terms of the Association contract.

There is no language in either the memorandum or the association contract which would suggest that the Respondent's obligations be limited only to his work at Portage and Michigan City. The clear language of these agreements "belies any suggestion that the parties intended only a single-project agreement." *Cowboy Scaffolding* 326 NLRB 1050-1051 (1998).

I conclude that Johnsen offered the Market Recovery Program for these two projects but he did not thereby alter the specific terms of the memorandum and the association contract. Johnsen did not agree that the Sommerville's acceptance of the association contract would be limited to these two sites. But even if Sommerville could be credited, an oral understanding in variance of a written contract cannot be given controlling effect. As the Board said in *W. J. Holloway & Son*, 307 NLRB 487 fn. 1 (1992):

We find, in agreement with the judge, that the Respondent's written, executed 1987 agreement with the Union is controlling, and that any contrary oral understanding between them, i.e., that the contract would apply only to the current job, could not be given effect because it would not merely explain or clarify but rather invalidate and nullify the parties' written agreement. [Citations omitted.]

<sup>3</sup> At the outset of the hearing counsel for the General Counsel moved to amend the complaint to allege that the Respondent's repudiation of the contract includes this successor agreement. Counsel for the Respondent objected to the amendment, but agreed to go forward with the hearing, since all witnesses were present, and to treat the Respondent's liability under the successor as a compliance matter, should the Respondent be found liable. Counsel for the General Counsel and the Charging Party agreed to this procedure and I granted the amendment.

The Respondent's basic contention is there was no meeting of the minds, and therefore no enforceable contract. I reject this argument, under the above authority and I further note that within days of the October 31 meeting, Sommerville began complying with the terms of the agreement. I therefore conclude that Sommerville was bound by an enforceable contract and that his failure to abide by its terms violated Section 8(a)(5) of the Act. The Respondent should be ordered to comply with the terms of the association agreement and make whole all employees, and the fringe benefit trusts, for any losses suffered as a result of his repudiation of it.

#### REMEDY

Having concluded that the Respondent breached his obligations under his agreement with the Union, I shall recommend that he be ordered to make whole all employees who have not received the contractually required wages in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and reimburse them for any expenses they may have incurred because of his failure to make the required contributions to the fringe benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), enfd. Mem. 661 F.2d 940 (9th Cir. 1981), and the fringe benefits funds, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979), all amounts owing to be paid with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Whether and to what extent this make-whole remedy is applicable to the association contract effective May 31, 1998, will be determined in the compliance phase of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, Sommerville Construction Company, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Untimely repudiating the terms and conditions of its collective-bargaining agreement with International Union of Bricklayers & Allied Craftsmen Local No. 4 of Indiana and Kentucky, Merrillville Chapter, a/w International Union of Bricklayers & Allied Craftsmen, AFL-CIO, and failing and refusing to recognize and abide by the terms of that agreement.

(b) Refusing to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective-bargaining agreement, including, but not limited to, making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of his employees in the following appropriate unit:

All work performed by employees of the Respondent within the jurisdiction of the International Union, as defined in the Constitution of the International Union of Bricklayers & Allied Craftsmen, AFL-CIO.

(b) Make all employees in the bargaining unit whole, with interest, for any losses they may have suffered as a result of the Respondent's unlawful failure and refusal to adhere to the terms of the collective-bargaining agreement in the manner set forth in the remedy section.

(c) Make the pension and other benefit funds that are mandatory subjects of bargaining whole for the losses they have suffered as a result of the Respondent's unlawful failure and refusal to make the contractually required payment to those funds.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 25, post at its current jobsites within the geographic area encompassed by the appropriate unit and at its place of business in Indianapolis, Indiana, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director in a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."